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JAMES ALEXANDER, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, AND THE ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The interest of *Amicus Curiae* National Association of Manufacturers arises from the far-reaching consequences of any decision regarding a private right of action based on Title VI "disparate impact" regulations issued by federal funding agencies. *Amicus Curiae* is particularly concerned about "disparate impact" claims in the context of environmental permitting decisions made by state agencies.

Just two years ago, the Court considered the same question presented in this case, but in the context of a "disparate impact" challenge to an environmental permit issued by the Pennsylvania Department of Environmental Protection. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 118 S. Ct. 2296, *vacated as moot*, 524 U.S. 974 (1998). Although the factual context of the present case is plainly different,[2] the concerns exemplified by the *Chester Residents* case are just as pressing today as they were two years ago. As set forth below, those concerns warrant very careful consideration in reaching any conclusion about private rights of action under Title VI "disparate impact" regulations.

The National Association of Manufacturers is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

[2] *Amicus Curiae* takes no position on Alabama's English-only drivers license testing policy.

of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

The decision of the court of appeals adversely affects the ability of members of *Amicus Curiae* to obtain needed permits under key federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act (RCRA). These statutes require most major manufacturing facilities to obtain one or more environmental permits, which typically expire unless renewed every few years. Significant changes to the manufacturing facilities, in turn, typically require either new permits, or modifications to existing permits, before the changes may be put into effect.

These federal statutes ultimately delegate to state or local permitting agencies the authority to issue all or most environmental permits. However, the Eleventh Circuit's decision, by concluding that there is a private right of action in federal court based on "disparate impact" regulations under section 602 of the Civil Rights Act of 1964, interjects into the states' established permitting processes a wholly new set of issues.

Specifically, the decision below opens environmental permits to collateral attacks in federal court on the ground that they may have a "disparate impact" on a racial or ethnic group, based on criteria that are not clearly delineated, understood, or agreed upon. In the *Chester Residents* case, for example, the claim was that the Pennsylvania Department of Environmental Protection violated EPA's Title VI regulations by issuing a permit for a facility in an area with a higher percentage of minority residents than the percentage found in the county as a

whole.[3] The alleged violation was not the environmental performance of the facility, but rather its proximity to minority residents.

The uncertainty and delay in the permitting process caused by these "disparate impact" challenges will make it extremely difficult for companies to make essential planning decisions and will prevent or discourage the companies from obtaining permits necessary to modernize existing facilities in a timely manner, to construct new facilities, or even to continue operation of existing facilities. Local communities, as a result, may suffer increased pollution, loss of jobs, and a reduced tax base.

Amicus Curiae National Association of Manufacturers is committed to federal, state, and local environmental permitting programs that provide meaningful opportunities for community involvement and input. It believes that environmental permits should protect public health and the environment and that permits not meeting the relevant criteria should not be issued. However, the decision of the court of appeals will not result in more protective permits or foster greater compliance. Instead, it will cause significant uncertainty to be overlaid on the existing permitting processes, thereby undermining the environmental protection goals of the programs and making it more difficult for facilities to make beneficial changes.

STATEMENT OF THE CASE

Amicus Curiae National Association of Manufacturers adopts the statement of the case contained in the brief of Petitioners, as supplemented by the following summary.

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[3] Michael Mattheisen, *The U.S. Environmental Protection Agency's New Environmental Civil Rights Policy*, 18 Va. Env'tl L.J. 183, 199-206 (1999).

In the decision below, the Eleventh Circuit ruled that private parties can bring actions in federal court based on "disparate impact" regulations issued by federal agencies under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d - 2000d-7 (1994). Section 602 of Title VI, 42 U.S.C. § 2000d-1, provides that federal agencies are to promulgate regulations denying federal financial assistance to recipients who discriminate against persons on the basis of "race, color, or national origin."

The Title VI "disparate impact" regulations issued by many federal agencies state, in relevant part, that the agencies will withhold federal financial assistance if they find that the recipient is using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination" based on race, color, or national origin. In *Chester Residents, supra*, the private right of action was based on the regulations issued by the Environmental Protection Agency (EPA). 40 C.F.R. § 7.35(b). In this case, the private right of action was based on the regulations issued by the Department of Transportation. 49 C.F.R. § 21.5(b)(2). The relevant language in both sets of regulations is virtually identical.

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision, unless reversed, will have a profoundly adverse impact on permitting programs established by the federal environmental statutes and administered primarily by state regulatory agencies. The conclusion that parties can challenge state permitting decisions implementing federal environmental programs on "disparate impact" grounds makes the process of obtaining valid environmental permits substantially more difficult for reasons

unrelated to protecting human health and the environment. It will also introduce tremendous amounts of uncertainty and delay into the overall permitting process. Moreover, it will likely burden the federal courts with a vast number of challenges to such state permitting decisions.

To illustrate the potential impact of the Eleventh Circuit's reasoning, this brief focuses on two related permitting programs administered primarily by the states under one of the major federal environmental statutes – the Clean Air Act. These two programs govern the activities of a broad range of industrial facilities throughout the country, and the ability of companies to obtain permits under the programs in a reasonable manner is vital to the continued operation of those facilities. Both programs impose stringent pollution control requirements on applicants seeking permits and involve detailed permitting procedures, including extensive opportunities for public participation. However, the Eleventh Circuit's decision will wreak havoc on these Clean Air Act permitting programs by allowing parties to bring federal court challenges to final state permitting decisions on ill-defined "disparate impact" grounds.

Although permitting requirements under the various Clean Air Act programs are by now generally well understood and predictable, the Eleventh Circuit's decision would inject a great deal of uncertainty into these permitting programs. Because of the nature and variety of the claims that might later be raised, neither the permit applicant nor the state permitting authority could anticipate what showing must be made by the applicant to avoid having the final permit subsequently overturned by a federal court for causing a "disparate impact" on a particular group.

Ironically, Title VI "disparate impact" claims such as these will frequently harm the minority communities that the

proponents of the claims seek to benefit. Judicial actions based on such "disparate impact" claims will make it impossible or extremely difficult for companies to obtain, in a timely fashion, final environmental permits that can be relied upon. This will cripple the ability of a company to make the essential planning and investment decisions necessary to modernize existing facilities, or to construct newer and cleaner facilities near minority communities. As a consequence, such claims – or the threat of such claims – will eliminate jobs in the local community, lower the local tax base, and in many instances actually cause greater pollution in the area in question.

ARGUMENT

THE DECISION BELOW SERIOUSLY INTERFERES WITH STATE ENVIRONMENTAL PERMITTING PROGRAMS AND UNDERMINES THE GOALS OF THOSE PROGRAMS.

The Clean Air Act establishes two principal permitting programs that are generally applicable to stationary sources of air emissions: a preconstruction permit program under the New Source Review (NSR) provisions of the Act (42 U.S.C. §§ 7470-7515) and an operating permit program under Title V of the Act (42 U.S.C. §§ 7661-7661f). Among other things, the NSR program requires sources planning to undertake significant physical or operational changes in existing facilities to install more stringent pollution controls. The Title V program is primarily intended to incorporate all applicable clean air requirements governing the operation of a major source in one permit so that the permittee, the permitting authority, and the public will have a clearer understanding of the source's compliance obligations. Both permitting programs require sources seeking permits to comply with detailed, demanding requirements and to participate in extensive, time-consuming

permit proceedings. The programs also have an extremely broad reach – thousands of emissions sources across the nation must obtain permits under one or both programs, and those sources obtaining Title V operating permits must renew them every five years.

As currently constituted, the two permitting programs are relatively stable programs. They produce reasonably predictable results that protect human health and the environment. Permit applicants are ordinarily aware of the procedural and substantive requirements they must meet to secure a usable permit and are able to make key business decisions well in advance.

However, the Eleventh Circuit's decision, by allowing parties to raise "disparate impact" issues in federal court after a state permit has been issued, would severely disrupt the two permitting programs by causing an intolerable amount of uncertainty and delay. The vague and fluid nature of "disparate impact" claims will make it impossible for the permit recipient or the permitting authority to anticipate what claims could conceivably be raised. Because a final permit could later be challenged and overturned at some indefinite time for reasons unrelated to meeting environmental standards and protecting public health, the permit recipient cannot reasonably rely on that final permit.

As discussed below, these elements of uncertainty and delay will severely interfere with the ability of companies to obtain environmental permits critical to modernizing aging facilities and/or making changes necessary to respond to rapidly changing market demands. A company cannot reasonably make the investment and planning decisions necessary to proceed with a project if a final permit can later be collaterally attacked on "disparate impact" grounds under Title VI regulations – with

no clear indication of what issues might be raised or how long the litigation might last.

Finally, the fact that the Eleventh Circuit's decision will make it much more difficult for companies to obtain Clean Air Act permits will adversely affect the minority communities located near the facilities in question. If a plant is unable to modernize and remain competitive, it will ultimately provide fewer jobs and perhaps close altogether. The result will be abandoned industrial sites and economic harm to the minority community.

A. Current Clean Air Act Permitting Programs Require Facilities to Meet Stringent Requirements Designed to Reduce Emissions and Protect Public Health.

Both the NSR and Title V permitting programs reflect a regulatory approach based on principles of federalism. The statute provides that EPA is to delegate to state or local permitting agencies the authority to issue permits under the programs once the permitting agency has satisfied detailed requirements for establishing permit programs. Thus, in states or localities with approved programs, the state or local permitting authority is responsible for granting or denying permit applications, and judicial review of such decisions must be sought in state courts, not federal courts.

These state and local permitting agencies typically receive federal funds from EPA to assist them in implementing the Clean Air Act, including the Prevention of Significant Deterioration ("PSD") and Title V permitting programs. As a result, the Eleventh Circuit's decision would presumably allow parties to bring federal court "disparate impact" challenges to state or local permitting decisions made under those programs. *See generally Chester Residents, supra.*

Amicus Curiae briefly describes the permitting programs below and then discusses the adverse impacts that the Eleventh Circuit's decision would have upon them. It is important to recognize that the Clean Air Act permitting programs are discussed as examples of the wide range of federal and state permitting programs that will be disrupted by the Eleventh Circuit's decision. Similar serious problems will arise in permitting programs under the Clean Water Act, RCRA, and other environmental programs involving permit requirements. Furthermore, the Eleventh Circuit's decision would extend even beyond these fundamental permitting programs and interfere with federal, state, and local government efforts to revitalize urban areas by locating new industrial facilities on previously contaminated waste sites that have been cleaned up.

1. *The NSR Permitting Program*

Under the Clean Air Act, companies that seek to make changes at existing facilities or to construct new facilities may trigger NSR requirements under Parts C or D of Title I of the Act. 42 U.S.C. §§ 7470-7515. The question of whether a particular project will trigger NSR requirements depends on (1) whether the facility in question constitutes a "major stationary source"[4] and (2) whether the project will cause an emissions increase for a pollutant in excess of specified threshold levels. If a proposed project is determined to be subject to NSR, the company must obtain a preconstruction permit before undertaking the project.

The type of NSR permit required depends on whether or not the facility is located in an area which meets the national

[4] The terms "major emitting facility" and "major stationary source" are generally used interchangeably in the NSR program. The term "major stationary source" is defined at 40 C.F.R. § 51.166(b)(1)(I).

ambient air quality standard ("NAAQS") for the pollutant in question. Such standards, which are promulgated by EPA pursuant to section 109(b) of the Act, 42 U.S.C. § 7409(b), are designed to protect the public health and welfare in the area in question. For emissions sources located in "attainment areas,"[5] the preconstruction permit is referred to as a Prevention of Significant Deterioration ("PSD") permit. *See* sections 161 and 165(a)(1) of the Clean Air Act, 42 U.S.C. §§ 7471, 7475(a)(1). The principal purpose of the PSD permitting program is to ensure that attainment areas remain in compliance with the relevant NAAQS and that the existing clean air is not gradually degraded through increased pollution.

The states are primarily responsible for implementing the PSD permitting program. Sections 161 and 165(a) of the Act provide that each state is to include provisions in its State Implementation Plan ("SIP")[6] that will ensure that the PSD program is carried out. 42 U.S.C. §§ 7471, 7475(a). EPA administers the PSD program within a state only if that portion of the state's SIP is not approvable. 40 C.F.R. § 52.21(a).

To obtain a PSD permit, an applicant must satisfy a number of demanding, highly technical requirements. Among other things, the applicant must (1) demonstrate that emissions from the facility will not cause, or contribute to, pollution in excess of the NAAQS or any other emissions standard under the Act; (2) conduct and submit an extensive air quality impact analysis

[5] An "attainment area" is "any area . . . that meets the primary or secondary ambient air quality standard for the pollutant" in question. Section 107(d)(1)(A)(ii), 42 U.S.C. § 7407(d)(1)(A)(ii).

[6] Pursuant to section 110 of the Act, each state is to adopt and submit to EPA a plan which provides for the implementation, maintenance, and enforcement of the NAAQS for each pollutant in every region in the state. 42 U.S.C. § 7410.

for the area in question;[7] and (3) conduct monitoring to determine the effect which emissions from the facility may have on air quality in any area which may be affected by those emissions. *See generally* section 165(a).

Each proposed PSD permit is subject to an array of procedural requirements, including extensive public participation and comment requirements, before the state permitting authority may make a final decision granting or denying the permit. Among other things, the permitting authority must hold a "public hearing . . . with [an] opportunity for interested persons including representatives of the [EPA] Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." Section 165(a)(2).

Moreover, each final PSD permit must contain stringent emissions control requirements. For a source subject to PSD require-meats, the permit must require the use of the Best

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[7] The air quality impact analysis referred to above must include

> an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this [Act] which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region.

Section 165(e)(3)(B).

Achievable Control Technology ("BACT"), which is defined, in relevant part, as

> an emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation under this [Act] emitted from or which results from any major-emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility . . . .

Section 169(3), 42 U.S.C. § 7479(3).

2. *The Title V Operating Permit Program*

In the Clean Air Act Amendments of 1990,[8] Congress created a comprehensive operating permit program in Title V of the Clean Air Act, 42 U.S.C. §§ 7661-7661f. The primary purpose of that program is to require "major sources" for the first time to obtain federal operating permits that incorporate all existing Clean Air Act requirements applicable to each source. The Title V permit program is regarded as one of the most far-reaching and resource-intensive regulatory programs ever implemented by EPA under the Clean Air Act. EPA has estimated that 20,000 facilities throughout the nation will need to obtain Title V permits – many of which have not yet been issued.

In accordance with section 502 of the Act, state or local air agencies may obtain approval from EPA to administer the Title V program within their jurisdictions. 42 U.S.C. § 7661a. EPA

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[8] Pub. L. No. 101-549, 104 Stat. 2399.

has promulgated a detailed set of regulations in 40 C.F.R. Part 70 describing what permitting requirements and procedures state programs must contain. Upon EPA's approval of a proposed state program, the state is authorized to administer the Title V program in that state. At this point, virtually all states have had their Title V programs approved by EPA.

A source that is subject to the Title V program must submit a detailed permit application to the state permitting authority pursuant to section 503 of the Act. 42 U.S.C. § 7661b. Among other things, such applications must identify all relevant emissions units and all applicable requirements. At a large facility, there may be hundreds of individual emissions units and scores of requirements applicable to those units. Many Title V permit applications have been several inches thick.

Final Title V permits must set forth all applicable requirements as well as an array of inspection, entry, monitoring, compliance certification, recordkeeping, and reporting provisions. Section 504, 42 U.S.C. § 7661c. Title V permits must also be revised as necessary to reflect changes in the source's applicable requirements or other significant changes in status. For example, relevant applicable requirements contained in a PSD permit for a new project must also be incorporated in the source's Title V operating permit. In addition, all Title V permits expire after five years and must be renewed through new permit proceedings. Section 502(b)(5)(B), 42 U.S.C. § 7661a(b)(5)(B).

Each state's Title V program must provide for extensive public participation in the development of individual Title V permits. Section 502(b)(6) requires that state programs contain procedures for public notice and comment and an opportunity for a public hearing. 42 U.S.C. § 7661(b)(6). In addition, the

state program must provide for judicial review of final permitting decisions in state court. *Id.*

B. The Decision Below Substantially Increases the Uncertainty and Complexity of the Clean Air Act Permitting Programs.

The Eleventh Circuit's decision seriously disrupts the elaborate permitting processes under both the PSD and Title V programs by allowing challenges to final state permits in federal court on the ground that they may have a "disparate impact" on a particular racial or ethnic group. The claims raised in these judicial challenges would create a new set of issues that have little or nothing to do with whether the final permits meet all relevant Clean Air Act and state environmental requirements and will protect the public health. As discussed below, overlaying the existing permitting programs with an entirely separate, ill-defined set of issues would interfere with the effectiveness of those environmental protection programs and would likely have adverse consequences for the local communities involved.

The current PSD and Title V permitting processes already impose very demanding requirements on applicants, and the permit proceedings themselves are frequently very time-consuming. Permit applicants expend great sums of money to meet the detailed requirements for obtaining permits and to install the control measures necessary to ensure that permit terms will be met.[9] At the same time, permit applicants

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[9] Studies from the Bureau of the Census show that the chemical industry alone spent approximately $4.5 billion in 1994 in capital expenditures and operating costs to comply with federal and state pollution abatement requirements. These costs include only direct expenditures for pollution control and not the significant additional costs of obtaining permits. *U.S. Chemical Industry Handbook*, Chemical Manufacturers Association (1997),

generally understand what procedural and substantive steps they must take to obtain a permit and what criteria will be used to judge whether a permit should be issued. As a result, the outcome of the permit proceeding ordinarily is reasonably predictable, and applicants are able to develop plans and make investments based on their expectations.

However, the Eleventh Circuit's decision would create tremendous uncertainty as to what is required to obtain a permit that can be relied upon and would make the task of obtaining such a permit infinitely more difficult. A serious threshold problem is that the very concept of a "disparate impact" in this context is vaguely defined and almost completely open-ended. The Title VI regulations themselves, which would be the basis for the private right of action, provide no meaningful definitions.

The assumption apparently underlying such "disparate impact" claims is that facilities that give rise to pollution should be located so that all identifiable racial or ethnic groups are exposed more or less equally to the pollution. Accordingly, there are numerous theories and arguments that conceivably could be advanced as to why a permitting decision for a particular facility somehow creates a "disparate impact" with regard to a racial or ethnic group in a particular area.[10]

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p. 136.

[10] Claims based on alleged "disparate impacts" have recently been raised in many different situations. For example, a pollution reduction program developed by the South Coast Air Quality Management District in California has been judicially challenged by groups on "disparate impact" grounds. The goal of the program is to promote early retirement of heavily polluting automobiles by allowing businesses to pay into a fund that is used to buy old vehicles. However, the plaintiffs contend that the program has discriminatory effects because industrial plants located near minority communities would allegedly use credits generated from the program to

On a practical level, it would be almost impossible to anticipate what specific showing a permit applicant would be required to make so that its permit would survive a post-issuance "disparate impact" challenge. For example, it would be unclear what ZIP code, census tract, or other geographic area should be used as the basis for comparison; what constitutes the target population; what is the "appropriate" reference area; what are the numerical criteria for establishing a "disparate impact"; and, finally, whether any disparity reflects impermissible discrimination, on the one hand, or reflects permissible socioeconomic and other factors, on the other.[11] Rather than addressing environmental issues, the Title VI court challenge may focus on such matters as census data, statistical analyses, historical studies, zoning decisions, and growth and land use patterns. Even if a source attempted to anticipate the kind of showing it must make to prove a negative – to prove the absence of any "disparate impact" – the plaintiffs can simply adopt a different approach and then demand that the source refute the different approach. Moreover, given the lack of clear criteria for determining what constitutes a "disparate impact" in the context of environmental permitting, federal courts presented with such "disparate impact" claims will likely struggle to develop uniform guiding principles for addressing the claims.

The uncertainty and complexity which will be engendered by "disparate impact" issues will substantially delay the issuance of numerous Clean Air Act permits. Even when a

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increase their emissions. Marla Cone, *Civil Rights Suit Attacks Trade in Pollution Credits*, Los Angeles Times, July 23, 1997, at 1.

[11] *See generally Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712, 713-15 (7th Cir. 1998) (describing origins, purposes, and limitations of disparate impact analysis).

permit has been issued, the filing of a subsequent "disparate impact" challenge in federal court – or the threat of such a challenge – would significantly delay the time when a permittee could actually rely on the permit in order to make necessary investment, production, and marketing decisions.

The problem of delay is particularly crucial with regard to many PSD permits and for requested revisions to Title V permits. Sources frequently need to obtain PSD permits or Title V permit revisions relatively quickly because they must make physical or operational changes to respond to rapidly changing market conditions and remain competitive. For example, a pharmaceutical company may need to change its production processes or install new equipment at a facility in order to rapidly meet the demand for a newly-approved, important drug. If the company is unable to secure the necessary permit or permit revision in a reasonably expeditious way and rely upon it to take action, the company will suffer economic harm and the benefits of the drug to consumers will be postponed indefinitely. The interjection of "disparate impact" issues in federal court litigation after the conclusion of state permit proceedings would have a crippling effect on the ability of sources to meet market demands in a timely manner or simply to modernize an aging facility.

Moreover, under the Eleventh Circuit's decision, any person can challenge, on "disparate impact" grounds, a source's Title V permit *renewal* (required every five years). The source would then be forced to defend its continuing operation of the facility even if no significant changes had been proposed and no environmental standards had ever been violated. Conceivably, the facility could be forced to cease operating based on "disparate impact" grounds even though it had operated in accordance with all environmental laws for years.

It is important to recognize that the plaintiffs in a "disparate impact" challenge would have every incentive to make the proceedings last as long as possible. The source cannot commence construction on a new project until it has received the necessary final permit or permit revision and cannot reasonably rely on a permit or permit revision if it has been – or could be – collaterally challenged on grounds that are distinct from the basis on which the permit was granted. The longer the entire process takes, the greater the negotiating leverage gained by the plaintiffs. Bluntly put, a plaintiff may be able to force the permittee or permitting authority to make "concessions" – perhaps not related to environmental concerns – even though the plaintiff's substantive position lacks any merit whatsoever.

C. The Resulting Disruption of Clean Air Act Permitting Processes Would Lead to Adverse Consequences for the Environment and Local Communities, as Well as for Sources Seeking Permits.

The disruptions in the Clean Air Act permitting processes caused by interjection of entirely separate "disparate impact" issues after permit issuance will also lead to many other adverse results. Indeed, "disparate impact" claims will actually be counterproductive in many instances by causing greater pollution and doing economic harm to local communities.

These adverse results follow primarily from the fact that "disparate impact" claims will make it much more difficult and time-consuming for sources to obtain PSD permits or Title V permit revisions in order to modernize their facilities or to respond quickly to market demands. The filing of a federal court challenge based on "disparate impact" claims may prevent a source from receiving a necessary permit or permit revision in a timely manner – or receiving it at all. Beyond that, the very real possibility that such a challenge could be brought even

though the source satisfies all applicable environmental requirements may be enough to discourage the source from making improvements and changes at the facility in question.

If a facility is unable to make changes because of uncertainty resulting from "disparate impact" claims, it will operate less efficiently and become less competitive. Indeed, if a company cannot make needed changes at a particular facility, e.g., changes enabling the company to produce a new product, the company will likely make those changes at another facility. If the company is unable to keep a particular facility operating efficiently because of the inability to make physical or operational changes, the company will likely be forced to close the facility and move its operations elsewhere. As a result, jobs would be lost in the local community and the industrial site would be abandoned. The local tax base would also be reduced, thereby making it more difficult to provide services to residents in the community.

Moreover, "disparate impact" challenges to PSD permits would in many instances actually prevent emissions reductions from being made at a facility. This result may come about for either or both of two reasons. First, PSD permitting requirements are frequently triggered under the applicable regulations even though the proposed change will not, in fact, cause a significant increase in *actual* emissions.[12] Second,

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[12] To determine whether a PSD permit is required for a proposed modification, EPA believes that the facility's pre-change *actual* emissions should be compared to its post-change *potential* emissions, regardless of whether the post-change actual emissions would even approach the theoretical potential emissions. In calculating potential emissions, EPA generally assumes that the source will be operating continuously at full capacity and that it will not be using the stringent control technology it would have to use if PSD applies. This "actual-to-potential" approach was addressed in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989). There the court recognized that, under this approach, PSD requirements could be triggered even though actual emissions at a facility would be reduced by a new operational process. *Id.* at 293-94.

once the Act's PSD requirements are determined to apply, the source's later-issued PSD permit will require the use of BACT. This very stringent control technology requirement will result in actual emissions being substantially reduced – many times to levels lower than the pre-change levels. By making it much more difficult or even impossible for facilities to obtain PSD permits, challenges based on "disparate impact" grounds would destroy the environmental benefits to be gained by such permits.

In summary, under the approach taken in the Eleventh Circuit's decision, environmental permits issued by state agencies can be collaterally attacked in federal court even though the facilities satisfy all requirements for obtaining the permits, would comply with all environmental laws, and would, in fact, provide net environmental benefits. Because of the uncertainty and delay engendered by this approach, companies would be prevented or discouraged from modernizing their plants, and those plants would be unable to remain competitive in the marketplace. As a result, jobs would be lost in the affected communities. At the end of the day, everyone would lose – the local communities, the companies duly seeking environmental permits, and the state or local permitting authorities attempting to administer these programs.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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